

HLD-42 (January 2007)

January 19, 2007

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

**C.A. No. 06-4065**

JUAN DAVILA-BAJANA

vs.

TIM HOLOHAN, ET AL.

(W.D. Pa. Civ. No. 04-cv-00253)

PRESENT: SCIRICA, CHIEF JUDGE, WEIS and GARTH, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect; and

(2) Appellant's jurisdictional response

in the above-captioned case.

Respectfully,

Clerk


----- ORDER -----

Juan Davila-Bajana, a federal inmate, filed the underlying action asserting a claim under the Federal Torts Claim Act ("FTCA"), as well as claims alleging an 8<sup>th</sup> Amendment violation and retaliation pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Davila-Bajana appeals from the District Court's order entered August 21, 2006, in which it granted in part and denied in part defendants' motion to dismiss. The District Court concluded that appellant's FTCA claim was barred by the statute of limitations and that his 8<sup>th</sup> Amendment claim had not been exhausted, but that his retaliation claim should proceed. The case thus remains ongoing as to appellant's retaliation claim and, in fact, an order has recently been issued allowing him until February 16, 2007 to respond to defendants' second motion to dismiss.

To be appealable under 28 U.S.C. § 1291, an order must end the litigation as to all claims and all parties. Andrews v. United States, 373 U.S. 334 (1963). Because the order appealed does not dismiss all claims as to all parties and the District Court denied appellant's request for certification under Fed. R. Civ. P. 54(b) in an order entered October 6, 2006, the order is not appealable at this time. The appeal is thus dismissed for lack of appellate jurisdiction.

Dated: January 31, 2007  
tmk/cc: Mr. Juan Davilla-Bajana  
Robert L. Eberhardt, Esq

By the Court  
s/ WELB  
United States Circuit Judge  
A True Copy



*Marcia M. Waldron*  
Marcia M. Waldron, Clerk